No. 96-1258

Supreme Court, U.S.
FILED
MAR 13 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

ATLAS TURNER, INC.,

Petitioner,

vs.

HAROLD E. STRAUB and PAULINE STRAUB, husband and wife; BERNARD F. SIMBURGER and ROXIE L. SIMBURGER, husband and wife; and HELEN CONKWRIGHT, as surviving spouse of WILLIAM F. CONKWRIGHT, deceased, and on her own behalf,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

L. JOEL CHASTAIN
ROBERT C. ADAMS
On the Brief
NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE
2202 Jackson Street
Barnwell, SC 29812
(803) 259-9900

TIMOTHY E. EBLE
Counsel of Record
NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE
151 Meeting Street
Suite 600
Charleston, SC 29402
(803) 577-6747

Attorneys for Respondents

70731
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

LIST OF ALL PARTIES TO THE PROCEEDINGS

The respondents are correctly identified in the caption. Timothy E. Eble of Ness, Motley, Loadholt, Richardson & Poole, P.A., is counsel of record for all respondents. L. Joel Chastain and Robert C. Adams of Ness, Motley, Loadholt, Richardson & Poole, P.A., and Stanley J. Marks and Dena Rosen Epstein of Begam, Lewis, Marks & Wolfe, P.A., are also counsel for all respondents.

All of the respondents join in this brief in opposition.

TABLE OF CONTENTS

	Page
List of All Parties to the Proceedings	i
Table of Contents	ii
Table of Citations	iii
Statement of Jurisdiction	1
Statutes and Rule Involved	2
Statement of the Case	4
Reasons for Denying the Writ	8
I. This Court Has No Jurisdiction To Consider The Questions Presented Or The Petitioner's Arguments On Those Questions.	8
II. In Any Event, The Questions Presented For Review By Petitioner Do Not Raise Any Significant Issues Concerning The Foreign Sovereign Immunities Act That Are Sufficient To Warrant This Court's Review.	13
Conclusion	19

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Antoine v. Atlas Turner, 66 F.3d 105 (6th Cir. 1995) 5, 6, 13, 14, 15

Conkwright v. AC&S, Inc., No. 94-15066, slip op. (9th Cir. Oct. 17, 1994) 1, 4, 5, 7

Conkwright v. A.C. & S., Inc., Nos. 95-16049, 95-16086, 95-16101, slip op. (9th Cir. Nov. 7, 1996) 1, 10, 11

Conkwright v. A.C. & S., Inc., Nos. 95-16049, 95-16086, 95-16101, slip op. (9th Cir. Dec. 20, 1996, and Dec. 30, 1996) 1

Federal Trade Commission v. Minneapolis-Honeywell Regulator, 344 U.S. 206 (1952) 13

Finamar Investors, Inc. v. Republic of Tadjikistan, 889 F. Supp. 114 (S.D.N.Y. 1995) 17

First City, Texas-Houston v. Rafidain Bank, No. 90-7360, 1992 U.S. Dist. LEXIS 15235 (S.D.N.Y. Oct. 6, 1992) 17, 18

Harris Corp. v. National Iranian Radio and Television, 691 F.2d 1344 (11th Cir. 1982) 17

Lippus v. Dahlgren Mfg. Co., 644 F. Supp. 1473 (E.D.N.Y. 1986) 17, 18

Contents

Page

Shell Oil Co. v. M/V Itanage, 830 F. Supp. 1423 (M.D. Fla. 1993) 17, 18

Sherer v. Construcciones Aeronauticas, S.A., 987 F.2d 1246 (6th Cir.), *cert. denied*, 510 U.S. 818 (1993) 17

Simberger v. The Celotex Corp., No. 94-15095, slip op. (9th Cir. Oct. 17, 1994) 1, 4, 5, 7

Straub v. A.P. Green, Inc., 38 F.3d 448 (9th Cir. 1994) 1, 4, 5, 7, 10, 12, 13, 14, 17

Transaero, Inc. v. La Fuerza Area Boliviana, 30 F.3d 148 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1101 (1995) 16, 17

Unidyne Corp. v. Aerolineas Argentinas, 590 F. Supp. 391 (E.D. Va. 1984) 17, 18

Velidor v. L/P/G Benghazi, 653 F.2d 812 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982) 17

Statutes Cited:

28 U.S.C. § 1254 2

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1608 ..... 10, 16

Contents

Page

28 U.S.C. § 1608(a) 16, 17

28 U.S.C. § 1608(b) 16, 17, 18

28 U.S.C. § 1608(c) 7

28 U.S.C. § 1608(e) 7, 13, 14

28 U.S.C. § 1610(c) 7

28 U.S.C. § 2101 2

28 U.S.C. § 2101(c) 13

Rules Cited:

Supreme Court Rules:

Rule 13 2

Rule 13.1 13

Rule 13.2 13

Rule 13.3 13

Other Authority Cited:

H.R. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604 6

Contents

Page

APPENDIX

Appendix A — Order of the United States District Court for the District of Arizona in *Straub, et ux. v. A.P. Green, Inc.* Dated October 30, 1985 ..... 1a

Appendix B — Motion and Order to Set Aside Default Judgment of the United States District Court for the District of Arizona in *Straub, et ux. v. A.P. Green, Inc., et al.* Dated May 6, 1991 ..... 3a

Appendix C — Motion to Set Aside Default Judgment of the United States District Court for the District of Arizona in *Simburger v. The Celotex Corporation, et al.* Dated July 26, 1993 ..... 5a

Appendix D — Defendant Atlas-Turner's Motion to Set Aside Default Judgment of the United States District Court for the District of Arizona in *Conkwright v. A.C.&S., Inc., et al.* Dated July 30, 1993 ..... 7a

Appendix E — Letter from Paul A. Jozef to Mr. Kevin B. Sweeney Dated June 7, 1993 ..... 9a

Appendix F — Excerpts of Appellant's Opening Brief in *Conkwright v. A.C.&S., Inc. Penn Corp. and Atlas Turner, Inc.* Dated September 25, 1995 ..... 10a

Appendix G — Memorandum and Order of the United States District Court for the Northern District of Ohio, Eastern Division in *Antoine, et al. v. Atlas Turner, Inc.* Filed January 30, 1997 ..... 16a

Respondents request that the Court deny the petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Ninth Circuit. The court of appeals' opinion in these three consolidated cases was unpublished: *Conkwright v. A.C. & S., Inc.*, Nos. 95-16049, 95-16086, 95-16101, slip op. (9th Cir. Nov. 7, 1996). (Pet. App. 1a.) The Ninth Circuit denied Atlas Turner's petition for rehearing and rejected the suggestion for rehearing en banc: *Conkwright v. A.C. & S., Inc.*, Nos. 95-16049, 95-16086, 95-16101, slip op. (9th Cir. Dec. 20, 1996, and Dec. 30, 1996). (Pet. App. 62a.)

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1254 (1). The questions presented for review in the petition were decided by the Ninth Circuit in opinions entered more than two years before entry of the opinion petitioner now asks the Court to review: *Straub v. A.P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994) (Pet. App. 15a), *Simberger* [*sic*] *v. The Celotex Corp.*, No. 94-15095, slip op. (9th Cir. Oct. 17, 1994) (Pet. App. 11a); and *Conkwright v. AC&S, Inc.*, No. 94-15066, slip op. (9th Cir. Oct. 17, 1994). (Pet. App. 13a.) Atlas Turner did not petition the Court for writ for certiorari seeking review of those opinions. Petitioner now seeks to present questions decided by the Ninth Circuit in 1994, not the questions decided by the Ninth Circuit in the unreported opinion entered on November 7, 1996: *Conkwright v. AC&S, Inc.*, Nos. 95-16049, 95-16086 and 95-16101, slip op. (9th Cir. Nov. 7, 1996). (Pet. App. 1a.) The time for presentation of the questions arising from the 1994 opinions has long since expired and Atlas Turner's arguments on those questions may not properly be considered now. *See* pp. 8-13 below.

STATUTES AND RULE INVOLVED

28 U.S.C. § 1254 (1994) Courts of appeals; certiorari; certified questions

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

28 U.S.C. § 2101 (1994) Supreme Court; time for appeal or certiorari; docketing; stay

* * *

> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days. . . .

Rule 13, Rules of the Supreme Court of the United States. Review on Certiorari; Time for Petitioning

> 1. Unless otherwise provided by law, a petition for a writ of certiorari to review a

judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

2. The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time. See, *e.g.*, 28 U.S.C. § 2101(c).

3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. A suggestion made to a United States court of appeals for a rehearing en banc is not a petition for rehearing within the meaning of this Rule unless so treated by the United States court of appeals.

STATEMENT OF THE CASE

Respondents respectfully bring to the Court's attention additional facts to clarify petitioner's statement of the case and also to correct certain misstatements in the petition.

Petitioner fails to explain to the Court that, of the three cases involved, two *(Straub* and *Simburger)* were consolidated with two additional cases on October 30, 1985, by order of the district court. (Brief in Opp. App. 1a.) Petitioner also states that it "did not receive notice of these default judgments [in all three cases], by mail, personal service or otherwise." (Pet. 10.) If this statement is correct, petitioner would be hard put to explain the following sequence of dates: default judgment against petitioner in *Straub* was entered on April 1, 1991 (Pet. App. 58a); petitioner moved to set aside the default judgment in *Straub* on May 7, 1991 (Brief in Opp. App. 3a); and petitioner's motion was supported by the affidavit of its in-house counsel, Alain Dulude, dated April 25, 1991. (Pet. App. 66a.) Clearly, petitioner received notice of the *Straub* default judgment in some manner, in order to file a motion to set aside the default judgment some five weeks after its entry and to support its motion with an affidavit dated some three weeks after its entry.

Petitioner also makes no effort to explain the puzzling sequence of events concerning the *Simburger* and *Conkwright* default judgments and subsequent related pleadings. For example, the default judgment in *Simburger* was entered on March 8, 1988 (Pet. App. 61a), and the default judgment in *Conkwright* was entered on October 7, 1988. (Pet. App. 60a.) Yet, petitioner did not file motions to set these default judgments aside until August 1993 (Brief in Opp. App. 5a, 7a), both motions supported by affidavits dated July 16, 1993, by its in-house

counsel at the time, Richard Dufour. (Pet. App. 72a and 69a.)[1] Petitioner offers no explanation concerning how its local counsel moved so promptly to set aside the *Straub* default judgment, yet did nothing concerning the *Simburger* default judgment, entered more than three years earlier than the judgment in *Straub*, a case with which *Simburger* had been consolidated since 1985. Petitioner seeks to side-step such questions by stating that it never received any notice whatsoever of the default judgments in one sentence, followed immediately by this contradictory statement: "As its local defense counsel learned of these default judgments entered against it, Atlas Turner filed motions to set aside the default judgments. . . ." (Pet. 10-11.) It is obvious that petitioner *did* receive notice of the default judgments, else its local defense counsel never would have filed the motions to set the judgments aside. Petitioner merely obfuscates this issue with its evasive, contradictory, and disingenuous statements.

Petitioner also cites several provisions of the Foreign Sovereign Immunities Act of 1976 ("FSIA") in its petition and devotes six pages of its argument to the proposition that this Court should interpret certain provisions of the FSIA, which the various federal courts have allegedly interpreted inconsistently and over which the Ninth and Sixth Circuits allegedly are in conflict, because "both executive and congressional concerns are embodied in the FSIA." (Pet. 14-20.) Petitioner goes on to argue that the Ninth and Sixth Circuit conflict is over the issue whether a copy of a default judgment must be served on an instrumentality of a foreign sovereign. (Pet. 20-23.) To this end, petitioner quotes *Antoine v. Atlas Turner*, 66 F.3d 105 (6th Cir. 1995), for the proposition that, unlike the Ninth Circuit in *Straub*, the Sixth Circuit requires that a default judgment be served on the instrumentality itself,

1. Counsel for respondents formally served petitioner with the *Simburger* and *Conkwright* default judgments on June 7, 1993. (Brief in Opp. App. 9a.)

i.e., petitioner Atlas Turner. (Pet. 21.) Petitioner misinterprets the holding of the court in *Antoine*, even after quoting it in the petition. The court did not say that a copy of the default judgment should be served upon the instrumentality; it said that such judgment, "including judgments against agents and instrumentalities . . . , should be sent to the foreign state." (Pet. 21.) Nor does petitioner, in its extensive review of the legislative history of the FSIA, ever indicate just why a copy of the default judgment should be served in any event. The legislative history makes the reason for service of the default judgment perfectly clear, and also indicates why the FSIA is completely silent as to *when* the default judgment must be served:

> (c) *Necessity of court order following reasonable notice.* — Section 1610(c) prohibits attachment or execution under sections 1610(a) and (b) unless the court has issued an order for such attachment and execution. . . . This subsection contemplates that the courts will exercise their discretion in permitting execution. Prior to ordering attachment and execution, the court must determine that a reasonable period of time has elapsed following the entry of judgment, or in cases of a default judgment, since notice of the judgment was given to the foreign state under section 1608(e). . . .

H.R. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6629 ("House Report").

In other words, the main purpose in serving a copy of any judgment rendered against a foreign state or its instrumentality is to give notice of the judgment *prior to execution*. Rather than

imposing any deadline for the service of the judgment, including a default judgment, Congress obviously intended for a period of time to pass between notice of the judgment and any execution upon the judgment. Because respondents have not yet executed on these default judgments and petitioner has received copies of the judgments, § 1608(e) has been satisfied. Moreover, following entry of judgment and notice of the judgment required by § 1608(e), § 1610(c) requires a court order for attachment and execution. Petitioner has not, and cannot, state that respondents have made any attempt whatsoever to execute upon the default judgments at issue. Pursuant to § 1610(c), petitioner could not, under any circumstances, even attempt to execute without court approval and an order allowing execution.

As the above demonstrates, petitioner had notice of the default judgment in *Straub* no later than April 25, 1991, and had notice of the default judgments in *Simburger* and *Conkwright* no later than July 16, 1993, as evidenced by the affidavits of its in-house counsel. Since respondents did not, and could not, even attempt to execute upon their judgments without court approval and an order, and have, in fact, made no attempts to execute as of this date, petitioner's arguments concerning the urgent need for this Court's interpretation of one sentence of § 1608(e) of the FSIA, because of executive and legislative concerns, are completely unfounded. Any judgment, including a default judgment, is valueless if the judgment creditor cannot execute on the judgment. As § 1610(c) indicates, and as the House Report makes perfectly clear, there can be no execution upon a judgment against a foreign sovereign or its instrumentality unless notice of the judgment has been given and the court, in its discretion, has determined that sufficient time has passed since the judgment was entered and the entity received actual notice.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER THE QUESTIONS PRESENTED OR THE PETITIONER'S ARGUMENTS ON THOSE QUESTIONS.

In its petition, petitioner Atlas Turner presents the following questions for review:

> 1. Whether Respondents were required to serve Petitioner Atlas Turner, Inc., a Canadian Crown Corporation, with the default judgments under § 1608(e) of the Foreign Sovereign Immunities Act of 1976.
>
> 2. Whether the default judgments against Petitioner Atlas Turner, Inc. should be set aside where Respondents did not serve Atlas Turner, Inc. with the default judgments and where Respondents' service of original process on Atlas Turner, Inc. did not strictly comply with § 1608(b) of the Foreign Sovereign Immunities Act of 1976.

(Pet. i).

These questions were decided by the Ninth Circuit on October 17, 1994 (Pet. App. 11a, 13a, 15a), more than two years before the filing of this petition. It is clear from the opinion of the Ninth Circuit filed on November 7, 1996, that the Ninth Circuit did not address the questions presented in Atlas Turner's petition for writ of certiorari. (Pet. App. 2a.) In the 1996 opinion, the Ninth Circuit held as follows:

> Atlas contests several of the district court's factual findings. Since they are all supported by the record, we decline to find any of them to be clearly erroneous.
>
> Atlas also disputes the district court's ruling that Atlas received actual notice of the complaints[.] We find that the district court properly placed the burden of proof upon plaintiffs. Further, this court cannot fault the district court's conclusion that Atlas received actual notice of the lawsuits as a result of plaintiffs' attempted service, particularly since a determination of actual notice is a highly fact-bound inquiry. . . .
>
> Atlas also contends that the district court erred by failing to follow the "law of the case" as set forth in *Straub I*. The law of the case doctrine prevents a court from relitigating an issue previously decided by the same or higher court in the identical case. . . .
>
> In *Straub I*, this [c]ourt disapproved of the district court's finding that Atlas had actual notice. However, the court remanded for further consideration of actual notice since it was not a dispositive issue before the district court. The law of the case doctrine does not apply because the district court considered substantially different facts on remand. . . .

(Pet. App. 3a) (citations omitted).

From the foregoing, there is little question that the second Ninth Circuit opinion in *Conkwright* simply affirmed the district court's factual findings and refusal to apply the law of the case doctrine in a situation where it had considered "substantially different facts on remand." These questions are simply not the questions presented for this Court's review in the petition.

The questions presented by petitioner in the present petition were decided by the Ninth Circuit in the October 17, 1994, opinion. For example, in construing § 1608 of the FISA, the Ninth Circuit held that, because Atlas Turner was an instrumentality of a foreign state, rather than a foreign state or political subdivision thereof, it "did not need to be served with a copy of the default judgment." (Pet. App. 28a.)

The Ninth Circuit further held that "substantial compliance," rather than the strict compliance now urged by petitioner, sufficed for the FSIA:

> We formally adopt a substantial compliance test for the FSIA. . . .
>
> Applying the substantial compliance test, Straub's failure to dispatch the complaint by the clerk of court did not per se deprive the district court of jurisdiction. The substantial compliance test, however, is satisfied only if Atlas Turner received actual notice of the lawsuit. The burden of proving actual notice remains with Straub. . . .

(Pet. App. 26a) (citation omitted).

There can be no dispute that these holdings in *Straub I* formed the basis for the questions now presented in this petition.

Nor can there be any dispute that the second Ninth Circuit opinion in these cases, purportedly the basis for the petition, had nothing to do with the Ninth Circuit's earlier construction of the FSIA: the second opinion merely affirmed the district court's factual finding on remand that petitioner did receive actual notice of the three lawsuits as a result of respondents' service of process on it, and the district court's refusal to apply the law of the case doctrine in a case on remand, where substantially different facts were presented. The situation is made perfectly clear by petitioner's statement of jurisdiction and the issues presented for review in its brief on the second appeal in *Conkwright*:

> It bears noting that the present appeal follows a narrow determination by the district court *solely* on the issue of actual notice. This determination followed a remand issued by this Court in the present case following its decision in *Straub v. A.P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994). In that case, this Court reversed the district court's denial of a motion to set aside a default judgment. In doing so, this Court left unresolved the issue of actual notice, and remanded the case to the district court to reconsider that issue. This Court, in the remand language of the present case, following its decision in *Straub I*, *supra*, stated that if Atlas Turner had actual notice of the complaint, the default was proper and judgment may enter. . . .

(Brief in Opp. App. 13a, 14a) (Emphasis added).

The following are the sole issues that were raised by petitioner in the second appeal to the Ninth Circuit:

ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT ERRED IN FINDING THAT ATLAS TURNER HAD ACTUAL NOTICE OF THE LAWSUIT AGAINST IT IN 1986

A. *THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO FOLLOW THE LAW OF THE CASE AS DECIDED IN STRAUB I*

B. *THE DISTRICT COURT ERRED IN CONCLUDING THAT THERE WAS NEW EVIDENCE TO SUPPORT A FINDING OF ACTUAL NOTICE*

C. *THE DISTRICT COURT ERRED IN REVISITING THE QUESTION OF STRAUB'S METHOD OF SERVICE*

D. *THE DISTRICT COURT ERRED IN PLACING THE BURDEN OF PROOF UPON ATLAS TURNER*

(Brief in Opp. App. 14a).

In summary, the petition, presenting the questions therein, should have been filed within ninety days of the Ninth Circuit's decision in *Straub I*, or approximately by January 15, 1995. Because it was filed over two years later, on February 4, 1997,

the petition is untimely under 28 U.S.C. § 2101(c) and this Court's Rules 13.1 and 13.3. *See also Federal Trade Commission v. Minneapolis-Honeywell Regulator*, 344 U.S. 206 (1952) (holding that the statutes limiting the appellate jurisdiction of the Supreme Court are not to be applied in such a way as to permit tolling of time limitations because of some event that occurs after the appealed judgment is rendered but that is of no import to matters to be dealt with on review by the Supreme Court). Therefore, the petition is improper under Rule 13.2, this Court cannot properly exercise jurisdiction over this case, and the petition should be dismissed or denied.

II.

IN ANY EVENT, THE QUESTIONS PRESENTED FOR REVIEW BY PETITIONER DO NOT RAISE ANY SIGNIFICANT ISSUES CONCERNING THE FOREIGN SOVEREIGN IMMUNITIES ACT THAT ARE SUFFICIENT TO WARRANT THIS COURT'S REVIEW.

Petitioner argues that Supreme Court review is needed to resolve a conflict between the circuit courts of appeal in interpreting the last sentence of 28 U.S.C. § 1608(e). In *Straub I*, *supra*, the Ninth Circuit held that § 1608(e) does not require service of a default judgment on a foreign instrumentality. (Pet. App. 28a.) The Sixth Circuit, in *Antoine*, *supra*, held that the statute requires either service of the default judgment upon the defendant or a showing that the defendant had actual notice of the default judgment. 66 F.3d at 109.[2]

---

2. The Sixth Circuit first held that "a default judgment against a 'foreign state, a political subdivision thereof, *or an agency or instrumentality* of a foreign state' . . . shall be sent to 'the foreign state or political subdivision.' " *Antoine*, 66 F.3d at 109. Next, the court held that, when copies of such a (Cont'd)

Since the enactment of the FSIA in 1976, United States courts of appeals have had occasion to interpret this sentence in only *Straub I* and *Antoine*. Not surprisingly, both of these cases involved the same defendant (petitioner) — a defendant that has made a practice of defaulting in virtually every lawsuit that has been filed against it since 1985.[3]

(Cont'd)
default judgment are not served pursuant to § 1608(e), the judgment is voidable, not void, because the service requirement is a condition subsequent to the entry of an otherwise proper judgment. 66 F.3d at 109. Finally, even if Atlas did not have actual notice that the default judgments had been entered, the Sixth Circuit held that the judgments were not necessarily void. *Id.* at 110. The court then remanded the case for further findings on actual notice and a determination whether the judgments should be set aside, in the absence of actual notice. *Id.* at 109-10. Significantly, the Sixth Circuit's ruling on § 1608(e) turned on actual notice: "[I]f Atlas did have actual notice, the judgments could not be vacated on § 1608(e) grounds." 66 F.3d at 109. Thus, the Sixth Circuit rule, like that of the Ninth Circuit, is that substantial compliance with the FSIA service requirements for default judgments suffices, and strict compliance is not required.

3. According to the court in *Antoine*:

> On June 5, 1985, Atlas' attorney, James Conroy, filed a Notice of Withdrawal as attorney for Atlas with the District Court. . . . Conroy's withdrawal was caused by a coverage dispute that developed between Atlas and Chubb & Son [Atlas' insurer], which had retained Conroy on behalf of Atlas. . . .
>
> On October 24, 1985, plaintiffs sought entry of default against Atlas. In support of their application for entry of default, plaintiffs filed an affidavit given by plaintiffs' counsel [stating that Atlas] had indicated it would no longer defend the underlying cases, and that

(Cont'd)

Thus, considering petitioner's default in the *Antoine* cases in 1985 and its default in these cases in 1986, in the context of its posture toward the U.S. asbestos litigation, as stated in its in-house counsel's letter in September 1985, it is clear that these defaults were neither accidental nor the result of lack of notice of any kind, but rather the result of a deliberate choice to go into default. Given the unusual posture petitioner has taken toward lawsuits filed against it, the likelihood of this issue being revisited by federal courts in the future is not great. The resources of the United State Supreme Court would be better utilized in deciding issues of a more widespread and substantive nature.

(Cont'd)

> since June 5, 1985, Atlas had not in fact defended itself in the underlying cases.

Antoine, 66 F.3d at 107-08.

Furthermore,

> [i]n two letters, both dated September 24, 1985, from Dulude [Atlas' in-house counsel] to Conroy on Atlas and Bell Asbestos Mines, Limited (hereinafter "Bell") letterhead, respectively, Dulude stated:
>
> > Over the last two years, the posture of Bell Asbestos Mines, Limited and Atlas Turner Inc in the U.S. asbestos litigation has changed considerably. For economic and other consideration, with which you are already acquainted, Bell and Atlas have taken a minimal defense posture and proceeded to default judgments in several cases.

Antoine v. Atlas Turner, Inc., No. 90CV2231, slip. op, (N.D. Ohio Jan. 30, 1997) (denying Atlas Turner's motion to set aside the default judgments on remand) (Brief in Opp. App. 18a).

Petitioner also argues that Supreme Court review is necessary because the lower courts are "inconsistent" in their interpretations of the service requirements of § 1608. What petitioner regards as "inconsistent" is merely the flexible application of a statute in a manner that affords justice to individual litigants. In making its argument, petitioner intermingles citations to cases involving § 1608(a) with those involving § 1608(b). However, those cases dealing with § 1608(a) are not relevant to the questions presented by petitioner. Section 1608(a) provides requirements for service of process upon a foreign state or subdivision; § 1608(b) provides methods for service of process upon a foreign agency or instrumentality. The lower courts have already determined that petitioner is an instrumentality of a foreign state, and petitioner does not now contest that determination. Accordingly, the provisions of § 1608(b) and not § 1608(a) apply to this case.

This distinction is significant. As noted by the D.C. Circuit,

> [s]ection 1608(b)(3) allows simple delivery "if reasonably calculated to give actual notice," showing that Congress was there concerned with substance rather than form; but the analogous subsection of section 1608(a) says nothing about actual notice. The distinction is neatly tailored to the differences between "foreign states" and "agencies or instrumentalities." The latter, typically international commercial enterprises, often possess a sophisticated knowledge of the United States legal system that other organs of foreign governments may lack.

Transaero, Inc. v. La Fuerza Area Boliviana, 30 F.3d 148, 154 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1101 (1995).

Accordingly, the D.C. Circuit, although holding that strict compliance with § 1608(a) is required, recognized that § 1608(b) may be satisfied by substantial compliance coupled with actual notice to the foreign entity. 30 F.3d at 154. *See also Finamar Investors, Inc. v. Republic of Tadjikistan*, 889 F. Supp. 114, 117-18 (S.D.N.Y. 1995) (discussing the rationale for requiring strict compliance with § 1608(a) and only substantial compliance with § 1608(b)).

Generally, the federal courts have held that § 1608(b) is satisfied by service that gives adequate notice to the foreign agency or instrumentality, even though the service may not meet all of the technical requirements of the statute. *Transaero*, *supra*, 30 F.3d at 153. Moreover, the United States circuit courts of appeals that have dealt with this issue appear uniformly to agree that substantial compliance with § 1608(b), coupled with actual notice to the defendant, is all that is required to perfect service on an agency or instrumentality. *See Straub I* (Pet. App. 26a); *Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246, 1250 (6th Cir.), *cert. denied*, 510 U.S. 818 (1993); *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344, 1352 (11th Cir. 1982); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 821 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982).

Petitioner cites four cases for the proposition that some federal courts require strict compliance with § 1608(b): *Shell Oil Co. v. M/V Itanage*, 830 F. Supp. 1423 (M.D. Fla. 1993); *First City, Texas-Houston v. Rafidain Bank*, No. 90-7360, 1992 U.S. Dist. LEXIS 15235 (S.D.N.Y. Oct. 6, 1992); *Lippus v. Dahlgren Mfg. Co.*, 644 F. Supp. 1473 (E.D.N.Y. 1986); and *Unidyne Corp. v. Aerolineas Argentinas*, 590 F. Supp. 391 (E.D. Va. 1984). (Pet. 25-26) In each of these cases, the plaintiff failed to comply strictly with § 1608(b). Petitioner claims these decisions establish "inconsistency" among the federal court decisions. However, the mere fact that some courts require strict

compliance with § 1608(b) does not demonstrate that cases are receiving disparate treatment under the FSIA. A careful review of these cases indicates the court in each ensured that the plaintiff would not lose the opportunity to have the case heard because of a technical failure to comply with the service statute. In three of the cases, the courts refused to dismiss the actions and permitted the plaintiffs a reasonable amount of time in which to perfect service. *See Shell Oil*, 830 F. Supp. at 1426; *First City*, 1992 U.S. Dist. LEXIS 15235 at 8; *Lippus*, 644 F. Supp. at 1479. In the fourth case, the court dismissed the plaintiff's action but clearly contemplated that the plaintiff would refile and perfect service of process. *See Unidyne*, 590 F. Supp. at 397 (dismissing without prejudice and refusing to discuss an issue that might be raised "if proper service is effected later").

The difference between these four decisions and those applying a substantial compliance analysis does not evince a disparity in the administration of justice from case to case. In general, the courts dealing with service of process under § 1608(b) administer justice in a flexible yet consistent fashion. Litigants in all cases cited, as well as in the present case, have been ensured a fair and consistent result. No need exists for this Court to decide whether strict or substantial compliance with 28 U.S.C. § 1608(b) is required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

TIMOTHY E. EBLE
Counsel of Record
NESS, MOTLEY, LOADHOLT,
RICHARDSON & POOLE
151 Meeting Street
Suite 600
Charleston, SC 29402
(803) 577-6747

L. JOEL CHASTAIN
ROBERT C. ADAMS
On the Brief
NESS, MOTLEY, LOADHOLT,
RICHARDSON & POOLE
2202 Jackson Street
Barnwell, SC 29812
(803) 259-9900

Attorneys for Respondents

APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA IN *STRAUB, ET. UX. v. A.P. GREEN, INC.* DATED OCTOBER 30, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Date October 30, 1985

No. CIV 85-431 PHX CLH (LEAD) [STRAUB]
CIV 85-432 PHX PGR
CIV 85-433 PHX CAM
CIV 85-434 PHX EHC
CIV 85-435 PHX RCB [SIMBURGER]
(CONSOLIDATED)

HAROLD E STRAUB, ET. UX.,

PLAINTIFF,

vs.

A. P. GREEN, INC.,

DEFENDANT.

IN THE ABOVE MATTER you are advised that the cases are now consolidated per Judge Hardy's order of October 28, 1985. In accordance with Local Rule 3(e), all pleadings will be filed in the lower numbered case. Therefore, future pleadings pertaining to either of these actions will be filed in CIV 85-431 PHX CLH, and the title page of the documents should be prepared as shown on the attached example.

Appendix A

Any document submitted for filing which does not conform with these instructions will be rejected.

IT IS FURTHER ORDERED resetting the hearing on all motions to dismiss to November 25, 1985 @ 2:00 pm.

RICHARD H. WEARE

By s/ Milva Bunch
Signature
DEPUTY CLERK

cc: All counsel of record

APPENDIX B — MOTION AND ORDER TO SET ASIDE DEFAULT JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA IN *STRAUB, ET UX. v. A.P. GREEN, INC., ET AL.* DATED MAY 6, 1991

Thomas P. Burke, II, Esq. - #009631
Craig A. McCarthy, Esq. - #013128
HOLLOWAY & THOMAS, P.C.
2700 N. Central Avenue, Ste. 1500
Phoenix, Arizona 85004
(602) 274-8289

Attorneys for Defendant Atlas Turner, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NO. CV 85-0431 PHX SMM

HAROLD E. STRAUB, et ux.,

Plaintiffs,

v.

A.P. GREEN, INC., et al.,

Defendants.

MOTION AND ORDER TO SET ASIDE DEFAULT JUDGMENT

Defendant, Atlas Turner, Inc., through undersigned counsel, hereby moves this Court, pursuant to the provisions of Rule

60(b)(4), Fed. R. Civ. P., to enter its order setting aside the Default Judgment ordered by this court on or about April 1, 1991, for the reason that such judicial determination is void under Rule 60(b), Fed. R. Civ. P., due to this court's lack of personal jurisdiction over Atlas Turner, Inc.

This motion is supported by the accompanying Memorandum of Points and Authorities, and Affidavit of Alain Dulude, submitted herewith, which are incorporated herein by this reference.

DATED this 6th day of May, 1991.

HOLLOWAY & THOMAS, P.C.

By s/ Craig A. McCarthy
Thomas P. Burke, II
Craig A. McCarthy
Attorneys for Defendant Atlas Turner

APPENDIX C — MOTION TO SET ASIDE DEFAULT JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA IN *SIMBURGER v. THE CELOTEX CORPORATION, ET AL.* DATED JULY 26, 1993

Kevin B. Sweeney, #11737
Peter C. Kelly, II, #014503
HOLLOWAY ODEGARD & SWEENEY, P.C.
Suite 210
2700 North Central Avenue
Phoenix, Arizona 85004
(602) 240-6670

Attorneys for Defendant Atlas Turner, Inc.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

NO. CIV. 85-435 PHX RCB

(Oral Argument Requested)

(Assigned to the Honorable Robert C. Broomfield)

BERNARD F. SIMBURGER and ROXIE L. SIMBURGER, husband and wife,

Plaintiffs,

vs.

THE CELOTEX CORPORATION, et al.,

Defendants.

Appendix C

MOTION TO SET ASIDE DEFAULT JUDGMENT

Defendant Atlas Turner, Inc., by and through counsel undersigned, hereby moves this Court, pursuant to the provisions of Rule 60(b)(4), Federal Rules of Civil Procedure, to enter an order setting aside the Default Judgment entered by this Court on March 3, 1988, for the reason that such Judgment is void under Rule 60(b), Federal Rules of Civil Procedure, due to this Court's lack of personal jurisdiction over Atlas Turner, Inc.

This motion is supported by the accompanying Memorandum of Points and Authorities and Affidavit of Richard Dufour (attached as Exhibit "1"), submitted herewith, which are incorporated herein by this reference.

. . .

RESPECTFULLY submitted this 26th day of July, 1993.

HOLLOWAY ODEGARD & SWEENY, P.C.

s/ Pete Kelly
Kevin B. Sweeney
Peter C. Kelly, II
2700 North Central Avenue
Suite 210
Phoenix, Arizona 85004
Attorneys for Defendant
Atlas Turner, Inc.

APPENDIX D — DEFENDANT ATLAS-TURNER'S MOTION TO SET ASIDE DEFAULT JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA IN *CONKWRIGHT v. A.C.&S., INC. ET AL.* DATED JULY 30, 1993

Kevin B. Sweeney, #11737
Peter C. Kelly, II, #014503
HOLLOWAY ODEGARD & SWEENEY, P.C.
Suite 210
2700 North Central Avenue
Phoenix, Arizona 85004
(602) 240-6670

Attorneys for Defendant Atlas Turner, Inc.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

NO. CIV 85-155-T-RMB

(Assigned to the Hon. Richard M. Bilby)

WILLIAM F. CONKWRIGHT and HELEN CONKWRIGHT, husband and wife,

Plaintiffs,

vs.

A. C. & S., INC. et al.,

Defendants.

Appendix D

DEFENDANT ATLAS-TURNER'S MOTION TO SET ASIDE DEFAULT JUDGMENT

Defendant Atlas Turner, Inc., by and through counsel undersigned, hereby moves this Court, pursuant to the provisions of Rule 60(b)(4), Federal Rules of Civil Procedure, to enter its Order Setting Aside the Default Judgment ordered by this Court on or about October 7, 1988, for the reason that such judgment is void under Rule 60(b), Federal Rules of Civil Procedure, due to this Court's lack of personal jurisdiction over Atlas Turner, Inc.

This motion is supported by the accompanying Memorandum of Points and Authorities and Affidavit of Richard Dufour (attached as Exhibit "1"), submitted herewith, which are incorporated herein by this reference.

RESPECTFULLY submitted this 30th day of July, 1993.

HOLLOWAY ODEGARD & SWEENY, P.C.

s/ Kevin B. Sweeney
Kevin B. Sweeney
Peter C. Kelly, II
2700 North Central Avenue
Suite 210
Phoenix, Arizona 85004
Attorneys for Defendant
Atlas Turner, Inc..

APPENDIX E — LETTER FROM PAUL A. JOZEF TO MR. KEVIN B. SWEENEY DATED JUNE 7, 1993

12842-28
12842-42

June 7, 1993

Mr. Kevin B. Sweeney
HOLLOWAY ODEGARD & SWEENEY
2700 North Central, Suite 210
Phoenix, Arizona 85004

Dear Kevin:

RE: Simburger v. Atlas-Turner, Inc., et al.
Conkwright v. Atlas-Turner, Inc., et al.

Attached are some discovery requests in the two above captioned cases. I have also included a copy of the original Complaint filed in each case, and the Default Judgment rendered.

As you represent Atlas-Turner locally, service upon you should be sufficient, and I would expect you to forward this discovery to the company for response.

Thank you for your prompt attention to this matter.

Very truly yours,

Paul A. Jozef
For the Firm

Appendix E

PAJ:nlj

Enclosures - 1. Notice of Service of Plaintiffs Conkwright's First Set of Non-Uniform Interrogatories to Defendant Atlas-Turner, Inc.

2. Plaintiffs Conkwright's First Set of Non-Uniform Interrogatories to Defendant Atlas-Turner, Inc.

3. Notice of Service of Plaintiffs Conkwright's Request for Production of Documents to Defendant Atlas-Turner, Inc.

4. Plaintiffs Conkwright's Request for Production to Defendant Atlas-Turner, Inc.

5. Plaintiffs Conkwright's Default Judgment Order.

6. Notice of Service of Plaintiffs Simburger's First Set of Non-Uniform Interrogatories to Defendant Atlas Turner, Inc.

7. Plaintiffs Simburger's First Set of Non-Uniform Interrogatories to Defendant Atlas-Turner, Inc.

8. Notice of Service of Plaintiffs Simburger's Request for Production of Documents to Defendant Atlas-Turner, Inc.

9. Plaintiffs Simburger's Request for Production to Defendant Atlas-Turner, Inc.

Appendix E

10. Plaintiffs Simburger's Judgment against Atlas-Turner, Inc.

11. Plaintiffs Conkwright's original and First Amended Complaints.

12. Plaintiffs Simburger's original and First Amended Complaints.

APPENDIX F — EXCERPTS OF APPELLANT'S OPENING BRIEF IN *CONKWRIGHT v. A.C.&S., INC. PENN CORP. AND ATLAS TURNER, INC.* DATED SEPTEMBER 25, 1995

IN THE UNITED STATES COURT OF APPEALS NINTH CIRCUIT

U.S. Court of Appeals
Docket No. 95-16049

District Court
Docket No. 95-00133-SMM

HELEN CONKWRIGHT, as surviving spouse of WILLIAM F. CONKWRIGHT deceased, and on her own behalf,

Plaintiffs-Appellees,

v.

A C & S, INC., Penn Corp.,

Defendant,

and

ATLAS TURNER, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Appendix F

APPELLANT'S OPENING BRIEF

Paul W. Holloway - 002046
Kevin B. Sweeney - 011737
HOLLOWAY ODEGARD & SWEENEY, P.C.
3101 North Central Avenue
Suite 1200
Phoenix, Arizona 85012
(602) 240-6670
Attorneys for Defendant-Appellant
Atlas-Turner, Inc.

* * *

STATEMENT OF JURISDICTION

This appeal arises initially from a district court denial of a motion to set aside a default judgment entered against Atlas Turner. This court, therefore, has jurisdiction pursuant to 28 U.S.C. § 1291.

It bears noting that the present appeal follows a narrow determination by the district court solely on the issue of actual notice. This determination followed a remand issued by this Court in the present case following its decision in *Straub v. A.P. Green, Inc.*, 38 F.d 3d 448 (9th Cir. 1994)[1]. In that case, this Court reversed the district court's denial of a motion to set aside a default judgment. In doing so, this Court left unresolved the issue of actual notice, and remanded the case to the district court to reconsider that issue. This Court, in the remand language of

---

1. All further references to this Court's previous decision will be to *Straub I*, and to the specific pages as appropriate.

the present case, following its decision in *Straub I, supra,* stated that if Atlas Turner had actual notice of the complaint, the default was proper and judgment may enter. Because the district court found actual notice existed, the effect of the remand, coupled with the district court's ruling, makes the district court's order a final order subject to appeal pursuant to 28 U.S.C. § 1291 . . .

* * *

ISSUES PRESENTED FOR REVIEW

I. DISTRICT COURT ERRED IN FINDING THAT ATLAS TURNER HAD ACTUAL NOTICE OF THE LAWSUIT AGAINST IT IN 1986

A. *THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO FOLLOW THE LAW OF THE CASE AS DECIDED IN STRAUB I*

B. *THE DISTRICT COURT ERRED IN CONCLUDING THAT THERE WAS NEW EVIDENCE TO SUPPORT A FINDING OF ACTUAL NOTICE*

C. *THE DISTRICT COURT ERRED IN REVISITING THE QUESTION OF STRAUB'S METHOD OF SERVICE*

D. *THE DISTRICT COURT ERRED IN IMPLICITLY PLACING THE BURDEN OF PROOF UPON ATLAS TURNER*

* * *

Appendix F

. . . and that Simburger's burden of proof could not be satisfied without Atlas Turner's cooperation. Of course there was absolutely no evidence before the district court, nor before this Court, that Atlas Turner had somehow refused to cooperate in discovery or in providing information.

Simply put, this is a fairly simple issue. The district court failed to properly apply the Law of the Case doctrine and came to some legal and factual conclusions which were directly in contravention of this Court's previous decision in *Straub I*. This Court is left with no alternative but to reverse the district court's order finding actual notice, must vacate the district court's order of May 16, 1995, and enter an order remanding this case with directions to the district court to vacate the default judgment entered against Atlas Turner. No other conclusion is possible. It is therefore respectfully requested that this Court so order.

RESPECTFULLY SUBMITTED this 25th day of September, 1995.

HOLLOWAY ODEGARD & SWEENEY, P.C.

By s/ Kevin B. Sweeney
Paul W. Holloway
Kevin B. Sweeney
3101 N. Central Avenue, Suite 1200
Phoenix, Arizona 85012
Attorneys for Defendant/Appellant
Atlas-Turner, Inc.

APPENDIX G — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION IN *ANTOINE, ET AL. v. ATLAS TURNER, INC.* FILED JANUARY 30, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:90CV2231

HON. GEORGE W. WHITE

EDWARD ANTOINE, et al.,

Plaintiff,

vs.

ATLAS TURNER, INC.,

Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on remand from the Sixth Circuit Court of Appeals wherein the district court's denial of Defendant Atlas Turner, Inc.'s (hereinafter "Atlas") Motion for Relief from judgment was reversed, in part.

This is one of four consolidated asbestos personal injury cases in which default judgments were obtained against defendant Atlas, a Canadian supplier, in 1985. Plaintiffs successfully moved to collect on these judgments from Atlas's

insurers pursuant to Ohio Revised Code §3929.06. Atlas subsequently filed a Motion for Relief from Judgment in accordance with Rules 55(b) and 60(b) of the Federal Rules of Civil Procedure, which the District Court denied. On appeal, the Sixth Circuit affirmed, in part, and reversed, in part, the district court's decision. The issue of whether Atlas received actual notice of the plaintiffs' application for default judgment is now before the Court on remand.

During a status call before this Court, discovery was permitted through August 2, 1996 on the remand issue. The parties fully briefed the matter and it is now before the Court for review.

The relevant facts in this case center begin with attorney James Conroy (hereinafter "Conroy") who represented Atlas in the underlying asbestos litigation until June 5, 1985. As the Sixth Circuit resolved on appeal, Conroy successfully withdrew as Atlas's counsel by notice to the Court on June 5, 1985.

In a letter, dated July 25, 1985, Conroy advised Alain Dulude (hereinafter "Dulude"), in-house counsel to Atlas, that he attended a hearing regarding his Notice of Withdrawal as Counsel for Atlas in several Ohio asbestos cases. Conroy elaborated in the letter that:

> The Judge inquired as to whether or not Atlas and Bell were aware of the potential ramifications of their failure to appear in these cases. I informed the Court that as far as I knew, Atlas and Bell were aware of the potential judicial remedies which could result from their continued failure to appear and defend. I made it clear, however, that in any

> event Atlas and Bell did not acquiesce to the jurisdiction of this Court.

(Letter from Conroy to Dulude of 7/25/85, at 1).

Atlas subsequently hired counsel, Thomas Meaney, Jr. (hereinafter "Meaney"), to represent its interests in pending asbestos litigation in Northern Ohio. In two letters, both dated September 24, 1985, from Dulude to Conroy on Atlas and Bell Asbestos Mines, Limited (hereinafter "Bell") letterhead, respectively, Dulude stated:

> Over the last two years, the posture of Bell Asbestos Mines, Limited and Atlas Turner Inc in the U.S. asbestos litigation has changed considerably. For economic and other consideration, with which you are already acquainted, Bell and Atlas have taken a minimal defense posture and proceeded to default judgments in several cases. After reviewing the overall situation and in contemplation of additional decisions regarding the position of Bell and Atlas in the U.S. asbestos litigation, I must advise you at this time that all matters involving Bell Asbestos mines Limited and/or Atlas Turner Inc. are to be transferred immediately to Thomas P. Meaney, Jr. Esq. of Burker [sic], Haber & Berick, 300 National City Bank Building, Cleveland, Ohio 44114 U.S.A. You will be contacted shortly by a representative of the Burke, Haber & Berick office to effectuate an orderly and efficient transfer of the files. . . .

Appendix G

(Letter from Dulude to Conroy of 9/24/85, at 1.)

A carbon copy of this letter was sent directly to Meaney. Meaney never entered an appearance in this matter, although he entered appearances in numerous other cases on behalf of Atlas in Northeast Ohio.

On October 23, 1985, plaintiffs filed a Notice of Application for Judgment in Case No. C-82-344 and three other asbestos litigation cases against Atlas with the Clerk of Courts in the United States District Court, Northern District of Ohio. Plaintiffs sent a copy of the Notice of Application for default judgment directly to Conroy. Conroy admits that he received a copy of the Notice of Application for Default Judgment on October 28, 1985 from the law offices of plaintiffs' attorney, Charles Cloninger (hereinafter "Cloninger"). Conroy stated in his deposition that he immediately contacted Meaney by telephone "to advise him that I had received this document, and I advised him that I was going to send them over to him. We discussed other aspects of the general representation of Bell and Atlas, as far as Tom was concerned, but the main thrust of this conversation was certainly this motion for default judgment." (Conroy Dep. at 17).

In follow up to his conversation with Meaney, Conroy sent a letter to him, dated October 29, 1985, wherein he stated:

> Further, I enclose for your immediate attention a Notice of Application for Judgment which I received on October 28, 1985 from Attorney M. Charles Cloninger. As is apparent from the Notice, Attorney Cloninger is seeking default judgment in

> favor of the above listed plaintiffs for the amounts set forth in the Notice. The hearing is scheduled for Thursday, October 31, 1985 at 2:00 P.M.
>
> At this time I am in the process of preparing our final statement for services to be submitted directly to Atlas. I shall be forwarding the same to the client in the very near future.

(Letter from Conroy to Meaney of 10/29/85, at 2.)

When asked whether he forwarded the letter to either Atlas or Dulude, Meaney stated in his deposition, "I can tell you I probably sent it on. I just can't tell you without having correspondence in front of me that I did." (Meaney Dep. at 14-15.). Regardless of whether he forwarded the letter, Meaney recalls "that when I received the letter, it was a matter of days — two or three days at the very most from the time I got the letter until this hearing was to take place, and that's why I was having telephonic communication between me and Dulude. In those days, I don't think we had faxes." (Meaney Dep. at 12.). Therefore, it is clear Meaney received notice of the default hearing and consequently notified Atlas's in-house counsel, Dulude[1].

A telephone hearing was held before the Court on October 31, 1985 wherein former Chief Judge Thomas D. Lambros orally granted Plaintiffs' motion for default judgment in this and three other asbestos litigation cases. A *Memorandum and Order* was

1. Dulude passed away before the Sixth Circuit remanded this matter to the district court.

subsequently issued on December 17, 1985 by former Chief Judge Lambros entering default judgments against Atlas for sums certain based upon Cloninger's affidavit in support of the motion.

On December 14, 1990, plaintiffs moved to collect from Atlas's insurers on these judgments pursuant to Ohio Revised Code §3929.06. On March 15, 1991, Atlas responded by filing a Motion for Relief from Judgment in accordance with Rules 55(b) and 60(b) of the Federal Rules of Civil Procedure.

The matter was referred to a Magistrate Judge to issue a report and recommendation. In his Report and Recommendation, issued May 19, 1992, the magistrate recommended that Atlas's motion be granted based on the plaintiff's failure to comply with the notice requirement of Rule 55(b), when it served the application for default and the default judgments on Conroy instead of Atlas.

Objections to the Report and Recommendation, as well as, a Brief in Opposition and Reply Brief were filed. Upon completion of all supplemental briefing, the District Court granted Plaintiffs' Objections to the Report and Recommendation; thus, denying Atlas's motion for relief on all grounds.

In response to the district court's denial of its motion for relief from judgment, Atlas appealed to the Sixth Circuit Court of Appeals which held that: "(1) the supplier's attorney's notice of withdrawal was sufficient to end his representation of the supplier, for purposes of determining whether notice to the attorney was notice to the supplier of the application for default judgments; (2) a default judgment that is not served on a foreign state, political subdivision thereof, or agency or instrumentality

thereof under the Foreign Sovereign Immunities Act (FSIA) is voidable, rather than void; and (3) remand was necessary for further proceedings on whether the supplier received actual notice of the applications for default judgments and the judgments themselves." *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105 (6th Cir. 1995).

Atlas argues that it is entitled to total relief from judgment because plaintiffs' claims are defensible as to liability and damages. It maintains that the default judgments were entered against it contrary to the Federal Rules of Civil Procedure, the Foreign Sovereign Immunities Act and due process of law.

The Court will first address whether Atlas had actual notice of the judgments, since an affirmative finding would leave the question of whether the default judgments should be set aside, on that basis, still open for resolution.

ACTUAL NOTICE

A. FOREIGN SOVEREIGN IMMUNITIES ACT

The critical question regarding compliance with service requirements of the FSIA, either substantially or strictly, turns on whether actual notice was received. *Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246 (6th Cir.), *cert. denied*, __ U.S. __, 114 S.Ct. 72 (1993). While this Court must address the plaintiffs' compliance under Rule 55, as a foreign entity, Atlas is also entitled to certain protections under the FSIA that this Court should consider first.

The FSIA provides in part:

Appendix G

> No judgment by default shall be entered by a court of the United states or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

28 U.S.C. §1608(e).

The Congressional intent of the FSIA is that the foreign government be apprised of the pendency of a lawsuit through service "*reasonably calculated* to give actual notice. . . ." 28 U.S.C. §1608(b)(3) (emphasis added). Knowing that an attorney has filed a notice of withdrawal and filing service upon that attorney without concurrently notifying the foreign entity is not reasonably calculated to give actual notice. The fact that notice to Atlas's former attorney *may have* traveled through Atlas's in-house counsel, through an attorney Atlas hired to represent it in its asbestos suits and, ultimately, directly to Atlas does not suggest reasonableness. Additionally, Atlas maintains that it never received direct notice of the judgment. While the evidence suggests that it was possible Atlas may have received notice of the judgments, the Court does not find that this is sufficient. *See e.g., First City, Texas-Houston, N.A. v. Rafidain Bank*, No. 90 Civ. 7360, 1992 WL 296434, at *1, 1992 U.S. Dist. LEXIS 15235, at *5 (S.D. N.Y. Oct. 6, 1992) (that defendant may have been aware of the lawsuit was of little import).

There is no dispute that the plaintiffs were aware that Conroy filed a Notice of Withdrawal in June 1985, four months after they filed their application for default. With this knowledge, the plaintiffs cannot maintain that they complied with the FSIA in

terms of reasonably assuring that the defendants were on notice of their intent to default. Because plaintiffs knew Atlas's attorney no longer intended to represent it in this matter; Atlas's status as a foreign entity and the fact that no subsequent filings were made by Atlas; it was their responsibility to assure that Atlas received direct notice of their intent to seek a default judgment in this matter. Minimally, Atlas should have received notice simultaneous to Conroy's. Serving Conroy the default notice four months *after* he filed notice that he was withdrawing his services on behalf of a foreign entity does not impute actual notice[2] upon Atlas. *See e.g., Vindigni v. Meyer*, 441 F.2d 376, 377-78 (2nd Cir. 1971) (once parties knew plaintiff's attorney had disappeared, defendant should have also sent notice to plaintiff personally, as well as attorney).

Plaintiffs' argument that they believed Conroy's withdrawal was still pending is an exercise in form over substance and particularly unpersuasive in an action as serious as seeking the entry of a default judgment. There is no evidence that plaintiffs knew Atlas retained replacement counsel. Therefore, whether Conroy's efforts eventually reached Dulude was immaterial at the time they forwarded notice to Conroy. What is germane is that plaintiffs knew the chances of notifying a foreign entity would be significantly diminished by service upon an attorney who clearly demonstrated that he was not to be considered counsel of record.

Considering the plaintiffs' awareness of Conroy's notice of

---

2. Actual notice is such notice as is positively proved to have been given to a party directly and personally, or such as he is presumed to have received personally because *the evidence within his knowledge was sufficient to put him upon inquiry.* BLACK'S LAW DICTIONARY 712 (6th ed. 1990) (emphasis added).

withdrawal in June 1985, it was *not* reasonable for them to send notice of their intent to pursue default to Conroy four months later. Once Conroy filed his Notice of Withdrawal and no notice of appearance was filed by replacement counsel, it was more reasonable than not to believe that Atlas *was not* a party represented by an attorney. Therefore, in an FSIA action where the defendants have made an appearance, but ceased any relationship with their attorney, plaintiffs have a duty to make service of a notice of intent to seek default directly upon the foreign entity.

B. FEDERAL RULES OF CIVIL PROCEDURE

Atlas maintains that the Federal Civil Rules of Procedure preclude entry of default judgment because plaintiffs' counsel knew that Conroy was no longer representing Atlas in October 1985. Federal Civil Rule 55(b)(2), upon which Atlas relies, provides that: "If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application." FED. R. CIV. P. 55(b)(2) (emphasis added). *See also* FED. R. CIV. P. 5(b) ("[w]henever under these rules service is required . . . to be made upon a party *represented by an attorney* the service shall be made upon the attorney unless service upon the party is ordered by the court.") (emphasis added).

There is no question that plaintiffs provided timely notice. However, the Sixth Circuit has resolved that Conroy was no longer representing Atlas in October 1985. Therefore, plaintiffs were obligated to serve Atlas directly in order to comply with the Federal Civil Rules. Their failure to provide such notice is a failure to provide actual notice.

Appendix G

Upon due consideration of plaintiffs' failure to provide actual notice of its application for default to the defendant, the Court will now address whether sufficient grounds exist to set aside the default judgment.

MOTION TO SET ASIDE JUDGMENT

The fact that Atlas did not receive actual notice of the default judgments does not automatically mean the judgment should be set aside. *Atlas*, 66 F.3d at 110 (citing *Transaero, Inc. v. LaFuerza Area Boliviana*, 24 F.3d 457, 462 (2d Cir. 1994)). Instead, the Court must consider the equitable factors promulgated by Rule 55 and one of the specific requirements set forth in Rule 60(b). The three equitable factors the Court must consider in setting aside a default entry are: (1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; and (3) whether culpable conduct of the defendant led to the default. *Berthelsen v. Kane*, 907 F.2d 617, 621 (6th Cir.) (citing *United Coin Meter Co. v. Seaboard Coastline RR*, 705 F.2d 839, 845 (6th Cir. 1983), *clarified, reh'g denied*, (6th Cir. 1990).

Once the entry has ripened into a default judgment, Rule 60(b) applies a stricter standard to setting aside such a judgment. *Waifersong Ltd., Inc. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992); *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 398 (6th Cir. 1987) ("A default can be set aside only under the stricter Rule 60(b) standards for setting aside final, appealable orders."), *cert. denied*, 484 U.S. 927 (1987). Rule 60(b) provides, in part, that: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for the following reasons: (1) mistake, inadvertence, surprise, or excusable

neglect; . . . (4) the judgment is void; . . . (6) any other reason justifying relief from the operation of the judgment." FED. R. CIV. P. 60(b).

One critical component of Rule 60(b) is that "[t]he motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." FED. R. CIV. P. 60(b). Since Atlas did not file its Motion for Relief from Judgment until six years after the judgment was entered, its claim for relief under (1) is eliminated. In addition, the Sixth Circuit eliminated relief under (4) when it held that if plaintiffs failed to provide actual notice of the default the judgment would be voidable not void. Therefore, relief under the 'catch-all' criterion of (6) is Atlas's last resort.

The Sixth Circuit has noted that Rule 60(b)(6) "applies in 'exceptional or extraordinary circumstances which are not addressed in the first five numbered sections of the rule." *Thompson v. American Home Assur. Co.*, 95 F.3d 429, 432 (6th Cir. 1996) (citing *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990)). Considering this criteria, as well as, the equitable factors set forth in *United Coin*, the evidence suggests that Atlas displayed a "reckless disregard for the effect of its conduct on judicial proceedings." *INVST Financial Group*, 815 F.2d at 399.

In regard to the first criteria, this is a case in which the defendant has entered an appearance. There is no question that Atlas was aware that this suit was pending inasmuch as it hired counsel to appear in the action. Atlas claims that it was its policy not to permit cases to go into default and admitted that "Attorney Meaney would be taking over the defense of all of the Atlas

cases. . . . Further, by October 1985, Atlas had directly retained counsel, including Meaney, to represent it in the asbestos litigation." However, Meaney inexplicably never entered an appearance in this action. There is no evidence prior to plaintiffs' filing the notice of default that Meaney had anything to do with this action.

The uncontroverted facts contradict Atlas's claim of a no default policy. Atlas does not deny the fact that it hired Meaney to represent it in its asbestos litigation cases. Per Atlas's direction, Meaney instructed Conroy to forward all notices regarding this action to him. There is no dispute that Conroy complied with Meaney's request and communicated the status of this case to Meaney, as well as, the fact that an application for default was filed. While this may not qualify as actual notice for purposes of Rule 55(b)(2) or the FSIA, it does call Atlas's conduct into question when it clearly would have received notice directly had its representative entered an appearance in this action. Therefore, regardless of whether Meaney chose not to participate or was instructed not to participate in this action, Atlas has never provided the Court any explanation as to why it failed to participate in this matter after Conroy's withdrawal.[3]

Atlas cannot now hide behind plaintiffs' failure to provide

3. Atlas attempts to argue that this case 'fell through the cracks' because of the sheer volume of asbestos cases under review. This does not explain, however, why it only reawakened to this action after its insurer notified it of plaintiffs' petition for damages. Atlas's failure to provide a plausible explanation for its six year abstention infers culpable conduct. *See, e.g Amernational Industries v. Action-Tungram*, 925 F.2d 970 (6th Cir. 1991) (delay caused by a flood of defendant's office and relocation, compounded by language barrier plus cultural, governmental, and political differences suggested that defendant's conduct was not culpable for failing to timely respond to plaintiffs discovery).

actual notice as a basis to set-aside judgment when the facts suggest its actions contributed to the failure to receive notice. Either Meaney was Atlas's representative in this litigation, received notice of the default judgment and failed to notify his client or Atlas simply 'dropped the ball' on this action creating a classic default posture by benign neglect. Neither scenario supports a finding of good cause to set aside the default judgment.

Under the second equitable factor, Atlas argues that the plaintiffs' assertion that it was a provider of raw asbestos fiber to plants where plaintiffs worked is not true. In evaluating any asserted defense in a Rule 60(b) motion, the "[l]ikelihood of success is not the measure . . . [r]ather, if any defense relied upon states a defense good at law, the meritorious defense has been advanced." *INVST*, 815 F.2d at 398-99 (quoting *United Coin*, 705 F.2d at 845 (emphasis in original)). A defense is considered sufficient if it contains "even a hint of a suggestion' which, proven at trial, would constitute a complete defense." *Id.* In its defense, Regardless of the merits of this defense, however, this factor alone cannot justify setting aside the default judgment.

Atlas admits that "the former attorney, Conroy, advised the new attorney for Atlas, Meaney, who did not even have the files, that he had received a notice of application for judgment that was set for hearing within days." Meaney testified that he notified Atlas' in-counsel, Dulude, of the hearing by telephone. Whether Meaney had the case file or not, he admitted that he would have attended the default hearing if his client requested that he do so.

Regardless of the fact that Dulude cannot testify as to

whether he notified Atlas of the hearing, every opportunity existed for the company to take some affirmative posture earlier in this action. Atlas knew its attorney withdrew from this case. For some unexplained reason, it hired an attorney to replace Conroy in this action who failed to enter an appearance. Atlas's argument that it was swamped by the sheer volume of asbestos cases is of little value when its attorneys actively sought to transfer any pending cases to newly appointed counsel. Issues like a potential default judgment should have certainly been a 'red flag' to follow up on the case. Atlas had the opportunity to take an active role in defending itself, but recklessly disregarded the affect of its conduct on the proceedings. This is a case in which the intransigence of the defendant renders a default judgment appropriate. *Compare with INVST Financial*, 815 F.2d at 400 (default judgments should not be used to discipline attorneys; it is the client who suffers by being deprived of his day in court).

The passage of time in this action has been significant. Eleven years have passed since the default judgments were entered by the Court. Even viewing this in the most conservative light, the plaintiffs have waited six years to collect on the judgments from Atlas's insurers. While "delay alone is not a sufficient basis for establishing prejudice", *Davis v. Musler*, 713 F.2d 907, 916 (2nd Cir. 1983), it may be considered if the evidence suggests delay will "result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion" *Id.* (citation omitted). Atlas has acknowledged that "[o]ne of the critical problem [sic] with these cases is the passage of time. In 1990, when these default judgments were brought to light, Atlas and undersigned counsel made a concerted effort to determine how these default judgments came to be entered five years earlier. *It was not easy*

then, and it is even more difficult now — six years later." Br. Supp. Mot. Relief J. at 4 (emphasis added). While the plaintiffs never argued loss of evidence or possible fraud and collusion, no one can argue that *initiating* discovery over ten years after an asbestos suit is filed creates increased difficulties.

The Court finds that neither good cause nor extraordinary circumstances exist to set aside the default judgment. Plaintiffs will be prejudiced and Atlas has engaged in culpable conduct. Based on the foregoing, defendants' Motion for Relief from Judgment is **denied**. Accordingly, an evidentiary hearing to address the scope of damages is scheduled **July 15,1997** at **10:00 a.m.**

IT IS SO ORDERED.

s/ George W. White
GEORGE W. WHITE
Chief Judge
UNITED STATES DISTRICT COURT